1987

GMW Construction, a partnership v. Robert Wayne Cox and Roni Cox : Brief of Appellant

Utah Court of Appeals

Nick Sampinos; attorney for appellant.
Marlynn Bennett Lema; attorney for respondents.

IN THE UTAH COURT OF APPEALS

GMW CONSTRUCTION, a partnership,	:	
Plaintiff and Appellant,	:	
vs.	:	Civil No. 870160-CA
ROBERT WAYNE COX and RONI COX,	:	
Defendants and Respondents.	:	#146

BRIEF OF PLAINTIFF/APPELLANT

APPEAL FROM THE JUDGMENT OF THE ELEVENTH CIRCUIT COURT IN AND FOR CARBON COUNTY, STATE OF UTAH
HONORABLE A. JOHN RUGGERI, JUDGE

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IN THE UTAH COURT OF APPEALS

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Defendants and Respondents.	:	Civil No. 870160-CA

BRIEF OF PLAINTIFF/APPELLANT

JURISDICTION OF COURT OF APPEALS

Jurisdiction in this Court is founded under Section 78-2a-a, U.C.A. and under Rule 3 of the Rules of the Utah Court of Appeals, as the appeal arises from a final judgment or order of the Eleventh Circuit Court, in and for Carbon County, State of Utah.

NATURE OF PROCEEDINGS

This is an action for the collection of money and foreclosure of a mechanic's lien.

STATEMENT OF THE ISSUES

Plaintiff and Appellant, GMW Construction, submits the following issues for disposition:

1. Whether the evidence produced at trial was sufficient to support a finding by the trial court that plaintiff's installation and repair of the firebrick and heatalator was the direct cause of the malfunction of the fireplace.

2. Whether the evidence presented at trial was sufficient to support a finding by the trial court that plaintiff's cutting and fitting of the rock and masonry work allowed chips and rock particles to damage defendants' television set and other furniture pieces.

3. Whether the evidence presented at trial was sufficient to support a finding by the trial court that plaintiff removed and destroyed an existing oak mantle belonging to defendants.

4. Whether the evidence presented at trial was sufficient to support a finding by the trial court that plaintiff's faulty construction/alteration was the direct cause of damages allegedly incurred by defendants.

STATEMENT OF THE CASE

A. Nature of Case: On or about January 19, 1985, GMW Construction by and through partners Frank Gomez and Linn McCourt, provided labor and materials for the upgrading of a fireplace at the home of defendants Cox in Price, Utah. The price agreed upon for such work and materials was $906.00. Following completion of the improvements, GMW sent a bill to the defendants. After repeated attempts to collect, GMW filed a Notice of Intention to Hold and Claim a Lien on April 9, 1985, upon the right, title and interest of defendants Cox in their home in Price, Utah.

B. Course of Proceedings: Thereafter, on or about October 1, 1985, GMW filed a Complaint for the collection of money owed and for the foreclosure of the aforementioned lien. Defendants filed an Answer and Counterclaim, alleging among other things, faulty workmanship and negligence.

On or about June 25, 1986, a pre-trial hearing was held before the Honorable A. John Ruggeri, Judge of the Eleventh Circuit Court, in and for Carbon County, State of Utah. On or about July 9, 1986, Judge Ruggeri entered his pre-trial order.

The case was tried before Judge Ruggeri on January 28, 1987. The appellant was represented by Nick Sampinos and the defendants were represented by Marlynn Lema.

On or about February 3, 1987, Judge Ruggeri entered his Memorandum of Decision. Thereafter, on March 27, 1987, Judge Ruggeri entered his Findings of Fact, Conclusions of Law and final Order in this case.

C. Disposition at the Trial Court: The trial court found in favor of defendants on their Counterclaim and against plaintiff on its Complaint and pursuant to its final order dated March 27, 1987, awarded judgment in favor of defendants in the sum of $4,154.83 plus $725.00 as and for attorney's fees and costs in the amount of $10.00 for a total of $4,989.83 together with interest at 8% per annum until paid.

On or about April 27, 1987, the undersigned counsel filed a Notice of Appeal with the Clerk of the Eleventh Circuit Court in and for Carbon County, State of Utah.

Appellant appeals the judgment rendered by the Eleventh Circuit Court in favor of defendants.

D. Statement of Facts: Defendants hired GMW, a partnership involving contractors Frank Gomez and Linn McCourt, to repair and upgrade the existing fireplace in

their older home. The repair consisted of replacing the firebrick within the firebox of the fireplace. The upgrade consisted of facing the existing fireplace with artificial stone and installation of hearth stone at the base of the fireplace.

Additionally, GMW extended the depth of the firebox by four inches to aid in the drawing ability of the fireplace. This was done in an effort to help remedy the defendants' complaint that the fireplace did not burn properly and that from time to time smoke would billow out.

The price for labor and materials, excluding the firebrick already purchased by defendants, pursuant to an oral agreement between GMW and defendants, was $906.00, to be paid upon completion of the work. GMW specifically pointed out to defendant Mrs. Cox, that replacement of the existing firebrick and upgrading of the facade would not improve the functioning of the fireplace if the fireplace was not already functioning properly. (Tr. at 1-16).

Upon entry into the home prior to commencement of the work, GMW's McCourt observed that the house had dirty walls and carpets. (Tr. at 19, 111-112). This observation was corroborated by GMW's then employee, George Rodney Smith. (Tr. at 120 and 121.) Despite the existing filthy con-

ditions, GMW moved the furniture away from the work site and covered the floor prior to commencement of the work on the fireplace. Following completion of the work, all debris was removed and the floor was cleaned. (Tr. at 16-18).

At the conclusion of the work, Mrs. Cox appeared satisfied and voiced her praise of the improvement to her fireplace. (Tr. at 18, 19 and 37).

Following completion of the job, GMW gave Mrs. Cox a bill for $906.00. The bill was not paid and partners McCourt and Gomez began contacting Mrs. Cox for payment. Mrs. Cox, pursuant to several different stories promised payment but none was made. (Tr. at 20 and 21).

Near the end of GMW's collection efforts, Mrs. Cox began complaining of chimney smoke. Partners Gomez and McCourt returned to the home, tested the fireplace and observed that it functioned properly. (Tr. at 21).

Mrs. Cox also began complaining about cracked mortar joints. GMW's McCourt indicated to Mrs. Cox that he would return to the job and remedy those cracks, but payment was first required. (Tr. at 53-56).

The bill was never paid and defendants, following receipt of a Summons and Complaint, filed a Counterclaim

alleging damage to their furniture, walls, drapes and carpet, and destruction of an alleged oak mantle. The damage to the walls and drapes was allegedly caused by the malfunction of the fireplace subsequent to GMW's work thereon. Defendant Mrs. Cox also claimed that it was her understanding that GMW would perform a complete reconstruction of the fireplace for $206.00 in labor with materials provided by defendants. (Tr. at 58-85).

SUMMARY OF ARGUMENT

Appellant contends that the evidence presented at trial was not sufficient to support several of the findings of the trial court upon which the judgment in favor of defendants was based. The specific contentions of appellant are set forth in the Argument.

ARGUMENT

POINT I

THE EVIDENCE PRESENTED AT TRIAL DID NOT SUPPORT A FINDING BY THE TRIAL COURT THAT PLAINTIFF'S INSTALLATION AND REPAIR OF THE FIREBRICK AND THE HEATALATOR WAS THE DIRECT CAUSE OF THE MALFUNCTION OF THE FIREPLACE.

In paragraph 2 of the trial court's Memorandum of Decision, and paragraph 5 of its Findings of Fact, Judge Ruggeri found that GMW's installation and repair of the firebrick and the heatalator was the direct cause of the malfunction of the fireplace. Even assuming that there was a malfunction of the fireplace, appellant strongly contends that its installation of the firebrick and heatalator could not have been the direct cause thereof. Appellant Linn McCourt testified that respondent Roni Cox contacted GMW Construction for the purpose of repairing and upgrading the fireplace in her home. (Tr. at 6). In direct response to counsel's question, "Did she explain to you how she wanted that fireplace fixed", appellant McCourt responded as follows:

> "She said it was just -- they condemned it, or they was going to condemn it, and she had to have the fire -- the fire-brick on the inside laid, and she wanted to put a face on it." (Tr. at 6).

Relative to the actual installation of the firebrick, appellant McCourt testified that his partner, Frank Gomez installed firebrick of the same width and consistency as the firebrick that existed within the firebox. (Tr. at 114 and 115). McCourt further testified that to his knowledge,

GMW did nothing to actually change the firebox, that the new firebrick was installed to the top of the firebox and that GMW did nothing that could plug the chimney or affect the operation of the fireplace damper in any way. (Tr. 114 and 115).

Michael Sheldon Counsel, a licensed general contractor, with fireplace construction experience and whose experience was clearly established, (Tr. at 44 and 45) testified about the effect of firebrick replacement (Tr. at 117 and 118).

Counsel for appellant propounded the following hypothetical question to Mr. Counsel:

> "Q. Assuming that the only work done on a particular fireplace is to place sculptured stone on the face of that fireplace, to replace the firebrick with new firebrick of the same size and consistency that was there before, and the placement of a new mantle on the said fireplace, and the installation of hearth stones at the foot of the fireplace, would installation of any or all of those items have any effect whatsoever on the function of the fireplace?
>
> A. No, it would not."

Relative to the specific installation of firebrick, Counsel corroborated McCourt's testimony, by indicating that in all fireplaces the damper mechanism sits above the

firebrick and that the firebrick has nothing to do with the opening and closing of the damper. (Tr. at 118.)

Relative to the installation of the heatalator, GMW contends that the evidence did not establish improper installation nor that GMW's installation of the heatalator was the cause of the alleged malfunction of the said fireplace.

According to Linn McCourt, the heatalator was installed in such a manner that it could be removed at any time, if so desired. (Tr. at 113). That manner of installation was consistent with the method of installation used by Mr. Cox. Mr. Cox testified that the heatalator had been purchased subsequent to Cox's purchase of the home and that they had simply slid the heatalator into the bottom of the fireplace. (Tr. at 90).

Mr. and Mrs. Cox failed to provide any expert testimony that would indicate improper installation of the firebrick and/or the heatalator. To the contrary, GMW introduced the testimony of Linn McCourt, an experienced fireplace mason, and that of Michael Counsel, a licensed general contractor, also experienced in fireplace construction. Despite the obvious superior knowledge of GMW's witnesses, the trial court apparently closed its eyes to their testimony and

found that GMW's work led to an alleged malfunction of the said fireplace.

Despite the trial court's ruling, GMW contends that, if anything, its work upon the fireplace, improved its functioning. During the performance of the work, Mrs. Cox complained to GMW that the fireplace had not been burning properly (Tr. at 14). In an effort to remedy the poor burning problem, GMW extended the depth of the said fireplace. According to the testimony of Linn McCourt, the increased depth of the fireplace would help the fireplace "draw" better (Tr. at 14 and 15). The increased depth theory was corroborated by the testimony of expert witness Michael Counsel. Mr. Counsel, at pages 45 and 46 of the Transcript, testified as follows:

> "Q. Can you tell me what effect, if any, adding four inches to the face of the fireplace, extending it out into the room, would have?
>
> A. It would aid the drawing of it.
>
> Q. What do you mean "drawing"?
>
> A. In other words, a fireplace has to draw to bring the smoke up through the chimney. It would make it better.
>
> Q. . . . So, extending it four inches would only make it better?

A. Right.

Q. Would it make it worse?

A. No. No possible way."

Finally, GMW contends that following completion of the job, the fireplace was in proper working order. According to Linn McCourt, he and his partner, Frank Gomez, having later returned to the Cox home at Mrs. Cox's request, tested the fireplace by burning a piece of paper. The test showed that the fireplace was functioning properly. (Tr. at 21).

POINT II

THE EVIDENCE PRESENTED AT TRIAL DID NOT SUPPORT A FINDING BY THE TRIAL COURT THAT PLAINTIFF'S CUTTING AND FITTING THE ROCK AND MASONRY WORK ALLOWED CHIPS AND ROCK PARTICLES TO DAMAGE DEFENDANTS' TELEVISION SET AND OTHER FURNITURE PIECES.

In paragraph 2 of the trial court's Memorandum Decision and paragraph 6 of its Findings of Fact, Judge Ruggeri found that GMW's cutting and fitting of the rock and masonry work allowed chips and rock particles to damage the defendants' television set and other furniture pieces. GMW strongly contends that the finding is contrary to the evidence presented at trial.

To prepare the work site, Linn McCourt testified that the furniture was moved at least five feet from the fireplace to provide sufficient room to work and a cover was then placed on the cleaned floor. (Tr. at 16).

Relative to cutting and fitting the rock, McCourt testified that the so called rock was actually a light weight, pre-cast, simulated rock that is designed to break at such points where it may be tapped by the mason's hammer. (Tr. at 29 and 30). McCourt further testified that to make the particular rocks fit, pieces as large as a fingernail are sometimes chipped off. Further, when chipping, the same is done by holding the rock between the mason and the fireplace, shielding the area behind the mason from any flying chips and as in this case, causing the chips to fall directly in front of the mason, onto the fireplace hearth. (Tr. at 34).

McCourt also testified that no chips went flying across the room and that at best, several fingernail size chips may have fallen two to three feet away from the fireplace. (Tr. at 34 and 35). McCourt further indicated that GMW has not experienced problems with chipping in the past. (Tr. at 35).

George Rodney Smith, a former employee of GMW, who worked on the Cox job, also testified that the furniture was moved and the floor covered prior to commencement of work on the fireplace. (Tr. at 35 and 36). Smith further testified that he could not remember any damage being done by GMW workers to the television or other furniture in the Cox home. (Tr. at 37).

During and upon completion of the masonry work, Mrs. Cox did not voice any concerns regarding the alleged damage to her furniture. In fact, according to McCourt's testimony, "the only thing she said was she was tickled pink with the job." (Tr. at 18). Smith testified that Mrs. Cox told him "you guys did a really nice job on it. It looks real good." (Tr. at 37).

Despite the corroborative and plausible testimony of McCourt and Smith, the trial court again apparently ignored the same and accepted the self serving imaginative version of Mrs. Cox relative to the rock cutting and placement.

POINT III

THE EVIDENCE PRESENTED AT TRIAL DID NOT SUPPORT A FINDING BY THE TRIAL COURT THAT PLAINTIFF REMOVED AND DESTROYED AN EXISTING OAK MANTLE BELONGING TO DEFENDANTS.

In paragraph 5 of the trial court's Memorandum Decision and paragraph 7 of its Findings of Fact, Judge Ruggeri found that GMW removed and destroyed an existing oak mantle belonging to Mr. and Mrs. Cox. GMW again strongly contends that this finding is also contrary to the evidence presented at trial.

Linn McCourt of GMW testified that a mantle made of brown-painted plywood was part of the fireplace prior to commencement of the work by GMW. (Tr. at 29). McCourt further testified that the plywood mantle was replaced, at no extra cost to Mrs. Cox, with hearth stone and later discarded. (Tr. at 24). By replacing the mantle at no extra cost to Mrs. Cox, GMW felt that its reputation as well as the overall appearance of the fireplace would be enhanced. (Tr. at 56).

On further redirect examination, McCourt was asked by counsel whether the original Cox mantle was oak. (Tr. at 113). In response, McCourt stated:

> "Not to my knowledge, it wasn't. It looked like plywood to me painted with a, you know, like a 45 cut on the top that will make it look an inch-an-a-half, but it wasn't. If it would have been, I would have kept it, you know. We would have left it on there." (Tr. at 113).

Following that question and answer, McCourt was then asked whether Mrs. Cox objected to GMW's installation of the new mantle. (Tr.at 113). McCourt answered as follows:

> "No. We asked her prior to -- if she wanted us to put hearth stone instead of that, and she didn't tell us she wanted it put back on there. She said she liked that other hearth stone that we put on." (Tr. at 113).

To the contrary, Mrs. Cox testified that the mantle was made of oak. (Tr. at 77). She further testified that because everything else in the Cox home was oak, she wanted the alleged oak mantle put back onto the fireplace. (Tr. at 78). Interestingly, Linn McCourt testified that he did not observe any other oak trim in the house. (Tr. at 113). That observation is supported by the photographs admitted at trial.

Jeanine Langley, á friend of the Coxs' (Tr. at 99) testified on redirect examination that the mantle, in her opinion, was not plywood (Tr.at 101). On cross examination, however, Langley admitted that the mantle was painted or laquered and that she didn't look underneath the paint to identify the type of wood. (Tr. at 104). GMW contends that even if Langley had looked underneath the

paint, she still would not have been able to identify the wood. Langley had already testified that although the mantle appeared dark in color, she wasn't familiar with the identity of various woods. (Tr. at 100).

When comparing the respective testimonies, GMW submits that the trial court should have given more consideration to McCourt's expertise as a contractor. As per McCourt's testimony, he had been in the construction business at least seven years prior to the Cox job. (Tr. at 4). To the contrary, however, there was no evidence whatsoever to indicate that Mrs. Cox or her friend/witness, Ms. Langley, had any experience in the construction industry or at a threshold minimum, in the identification of various types of wood.

Despite the obvious disparity in relative expertise, Judge Ruggeri again chose to believe Mrs. Cox's self serving imaginative version of the story and capriciously concluded that the mantle was made of oak.

POINT IV

THE EVIDENCE PRESENTED AT TRIAL DID NOT SUPPORT A FINDING BY THE TRIAL COURT THAT PLAINTIFF'S FAULTY CONSTRUCTION/ ALTERATION WAS THE DIRECT CAUSE OF THE DAMAGES ALLEGEDLY INCURRED BY DEFENDANTS.

In paragraph 6 of the trial court's Memorandum Decision and paragraph 8 of its Findings of Fact, Judge Ruggeri found that GMW's faulty construction/alteration was the direct cause of the damages incurred by the Coxs, as follows:

Damage to TV tuner and furniture	$ 596.00
Damage to drapes and walls	620.55
Cleaning and painting	500.00
Repairs and cleaning of carpet	583.28
Oak Mantle destroyed	325.00
Replacement costs for fireplace	1,500.00
	$4,124.83

Of all findings by the trial court in this matter, GMW contends that this one is least supported by the evidence produced at trial.

First, other than the unfounded testimony of Mrs. Cox, (Tr. at 67), there was no other evidence to establish (1) that the alleged damage to the TV tuner and furniture was directly caused by GMW's construction work and (2) that the alleged damage amounted to $596.00. GMW contends that only an expert, someone trained in the field of television repair, could make such an analysis. As the record reflects, no such technician testified. Moreover, Judge

Ruggeri apparently accepted Mrs. Cox's unsubstantiated statement that the television set in question had been purchased in the prior year, at a cost of $596.00. (Tr. at 67). He then simply assessed damages thereon commensurate with that purchase price.

Second, GMW contends that the alleged damage to the home's drapes and walls was not proven by a preponderance of the evidence. In her testimony, Mrs. Cox testified that smoke, from the alleged malfunction of the fireplace subsequent to GMW's job completion, ruined her drapes and the same had to be discarded and then replaced. (Tr. at 72-75).

At trial, Mrs. Cox was not able to produce receipts for the alleged cost of replacement of the drapes (Tr. at pages 75-77). Subsequent to trial, however, and pursuant to permission by the trial court and stipulation of the parties, Mrs. Cox provided the trial court with receipts for her purported purchase of replacement drapes. (Tr. at 124 and 125). Copies of the receipts together with a cover letter from Coxs' attorney, Marlynn Lema, are attached. (See Addendum).

Despite the stipulated but otherwise unusual admission of receipts subsequent to trial, GMW contends that the same

are not sufficient proof that GMW caused damage to the drapes nor that they were replaced. At best, the exhibit shows a conglomeration of unexplained purchases from the Fingerhut Corporation on the account of a Mr. Phil Gonzales. According to a copy of a letter purportedly signed by a Mrs. Phil Gonzales, Mrs. Cox allegedly had authority to purchase items on that account. A copy of that letter is also attached. (See addendum).

Third, there was insufficient evidence to justify a finding that GMW's work was the direct cause of damage to the walls nor that the cleaning and painting thereof cost $500.00.

On direct examination, Mrs. Cox testified that subsequent to the alleged malfunction of the fireplace, she had to hire some people to come in and scrub walls for hours and days and weeks, and then repaint the same several times. (Tr. at 72). She further testified that the painting cost over $500.00. (Tr. at 73). On cross examination, however, Mrs. Cox testified that again she did not have receipts to prove the expenditure of $500.00 for the painting of the walls and that she had paid cash to her friends to do the necessary work. (Tr. at 84).

In further contradiction of the Coxs' claim for smoke damage, Linn McCourt, of GMW, testified that the walls were dirty prior to GMW's commencement of work on the fireplace. (Tr. at 112).

George Rodney Smith, GMW's former employee, also testified that the walls were dirty. (Tr. at 121).

Fourth, there was insufficient evidence to justify a finding that GMW's work created a need for the repairing and cleaning of the Coxs' carpet, nor that the Coxs' incurred a bill for the same in the sum of $573.28.

Mrs. Cox testified that during GMW's installation of the hearth stones, the carpet was improperly cut by Linn McCourt. (Tr. at 68). Despite the lack of foundation that GMW had ruined the Coxs' carpet and that replacement was necessary, Mrs. Cox testified that she had obtained a replacement estimate from Waterfall's Carpet of $573.28. (Tr.at 77). Here again, there was no corroborative evidence that the carpet had been viewed by an expert.

To the contrary, Linn McCourt, at pages 16 and 17 of Transcript, GMW testified as follows regarding cutting of the carpet:

> "Q. Was there anything done with the existing carpet that was in the home, next to the fireplace?

A. Yes, . . . we cut it back to put the hearthstone in, and then I left it two inches long --

Q. Left what two inches long?

A. The carpet.

Q. Why. . ?

A. So she could have her carpet guy come in and cut the carpet back and put it, . . . right to the rock.

Q. Did she agree to do that?

A. Yes. . . . and the next day she said, "Why don't you go ahead and cut it. I'm going to get new carpet next week."

Q. . . . But you still went in and cut it out nicely and squarely?

A. Yes. There was a piece there that I didn't get right tight, but it could have been fixed."

Relative to clean up of the floor, GMW contends, as set forth in Point II above, that the work site was covered prior to commencement of the work. Following completion of the job, Linn McCourt testified that his crew cleaned the floor. (Tr. at page 18 and 19).

George Rodney Smith, the former employee of GMW, on further rebuttal, testified that the house, including the carpet, was dirty prior to commencement of the work by GMW. (Tr. at 120 and 121).

McCourt went on to testify that upon his initial entry into the home, he detected the strong smell of dogs and cats. It was his feeling that the animals urinated on the floors. (Tr. at 111). McCourt also testified that the carpet was dirty, matted, stained and appeared to need replacement. (Tr. at 112).

Following McCourt's statement relative to the condition of the carpet, Judge Ruggeri sustained a motion to strike the same by Coxs' attorney (Tr. at 112). GMW argues that Judge Ruggeri abused his discretion in discarding McCourt's rebuttal testimony relative to the condition of the carpet. Mrs. Cox, during presentation of the Coxs' case, had testified regarding GMW's alleged damage to the carpet. (Tr. at 68 and 69). McCourt was merely pointing out that the carpet was filthy and by his observations, needed replacement. The perceived need for replacement corresponded with McCourt's prior testimony that Mrs. Cox told him to cut the carpet because she intended to replace the same the following week (Tr. at 17).

GMW also contends that since there was no expert testimony from the alleged carpet dealer as to causation of the alleged carpet damage nor even an introduction of any official written estimate for replacement of the carpet by

a carpet dealer, Judge Ruggeri abused his discretion by awarding damages of $583.23 to the Coxs. GMW also points out that the alleged bid by Waterfall's Carpet was $573.23 not $583.23. (Tr. at 77).

Fifth, GMW vehemently contends that Judge Ruggeri definitely abused his discretion in awarding the Coxs $325.00 for the alleged oak mantle that was destroyed by GMW. There was absolutely no evidence whatsoever presented at trial by anyone, to substantiate the value of the alleged oak mantle.

To the contrary as argued in Point III above, GMW's witness, Linn McCourt, an experienced contractor, testified that the Coxs' mantle was made of plywood and the same was replaced with hearth stone, at no extra cost to the Coxs and to Mrs. Cox's then apparent satisfaction.

Finally, GMW again strongly argues that Judge Ruggeri abused his discretion in awarding the Coxs $1,500.00 for the cost of replacing the fireplace. Again, the record is void of any evidence whatsoever relative to the cost of replacing the fireplace.

The Coxs simply alleged, in paragraph 5A of their Counterclaim, (Record), that replacement cost of the fireplace was $1,500.00. They failed, however, to present any

evidence at trial to substantiate that claim. Despite the obvious lack of evidence in that regard, Judge Ruggeri unjustifiably and gratuitously awarded damages in the sum of $1,500.00 to the Coxs.

Relative to all damages referenced in Point IV above, GMW contends that Judge Ruggeri apparently ignored the observations and corroborative competent testimony of McCourt and Smith, accepted the unsupported and unfounded testimony of Mrs. Cox and her seemingly biased neighbor, Langley, and thereby capriciously and unjustifiably awarded damages to the Coxs.

CONCLUSION

The Utah Supreme Court has held that the standard for determining the sufficiency of the evidence necessary to sustain a finding is whether the evidence is substantial. Kohler v. Gardner City, Utah 639 P.2d 162, 165 (1981) (quoting Charlton v. Hackett, Utah 360 P.2d 176 (1961)); Hal Taylor Associates v. Union America, Inc., Utah 657 P.2d 743, 747 (1982); Kirkella v. Baugh, Utah 660 P.2d 233, 235 (1983).

GMW respectfully submits that the evidence presented at trial was clearly inadequate to support the findings

referenced above and did not meet the standard previously set forth by the Utah Supreme Court.

GMW contends that in view of the lack of substantial evidence to support the referenced findings, the trial court's final judgment in favor of the defendants was unfair, excessive and in error.

We respectfully request that this Court reverse the lower court's final order granting judgment to defendants and remanding this case for a new trial.

DATED this 17TH day of September, 1987.

NICK SAMPINOS, Attorney
for Plaintiff/Appellant

AFFIDAVIT OF SERVICE

STATE OF UTAH)
: ss.
COUNTY OF CARBON)

NICK SAMPINOS, being first duly sworn, says:

That he served four (4) true and correct copies of the foregoing Brief of Plaintiff/Appellant upon Defendants/Respondents by hand delivering same to Defendants/Respondents' attorney of record, Marlynn B. Lema, at 248 East Main Street, Price, Utah, this 18th day of September, 1987.

Nick Sampinos
NICK SAMPINOS

Subscribed and sworn to before me this 18th day of September, 1987.

Hilda Preston
NOTARY PUBLIC

My Commission Expires:
November 13, 1990

Residing at:
Price, Utah

ADDENDUM

IN THE ELEVENTH JUDICIAL CIRCUIT COURT
CARBON COUNTY, STATE OF UTAH
- - -oOo- - -

GMW CONSTRUCTION,
a partnership,

plaintiff

-vs-

ROBERT WAYNE COX
and RONI COX,

defendants

- - - - - - - - - - - - - - -

MEMORANDUM OF DECISION

The Court makes the following findings of fact:

1. That the fireplace in question was operational and in use as the only source of heat at the time plaintiffs undertook repairs.

2. That the work done by plaintiffs resulted in structural modification of the fireplace as well as cosmetic damage.

3. That plaintiffs installation and repair of the firebrick and the "heatalator" was the direct cause of the malfunction of the fireplace.

4. That plaintiffs in cutting and fitting the rock and masonry work allowed chips and rock particles to damage the defendants television set and other furniture pieces.

5. That plaintiffs removed and destroyed an existing oak mantel belonging to the defendants.

6. That plaintiffs faulty construction/alteration is the direct cause of the damages incurred by defendants, as follows:

Damage to TV Tuner and Furniture	$596.00
Damage to Drapes and Walls	620.55
Cleaning and Painting	500.00
Repair and Cleaning of Carpet	583.28
Oak mantel destroyed	325.00
Replacement costs for Fireplace	1,500.00

Memorandum of Decision Continued:

7. That the pre-trial order provided for attorneys fees, and the Court fixes defendants attorneys fees at $725.00.

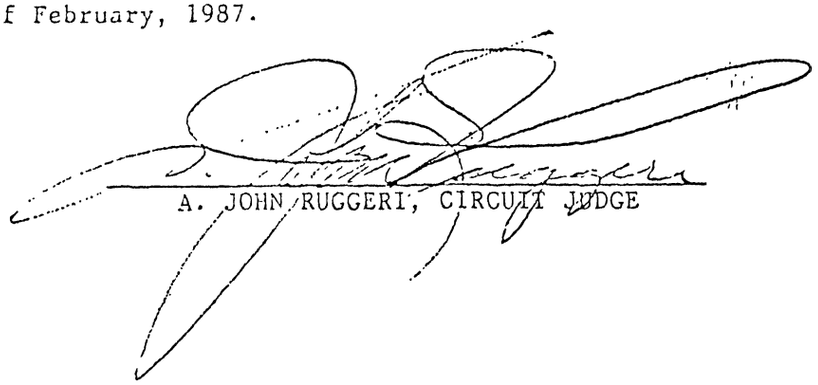
8. That plaintiffs returned, for credit, 100 red brick at 3¢ each for a total of $30.00, which amount belongs to defendants.

The Court makes the following Conclusions of Law:

1. That defendants are entitled to judgment in the amounts indicated in the findings, together with costs and attorneys fees.

2. That plaintiffs lien is not valid and must be released forthwith.

Dated this 3rd day of February, 1987.



A. JOHN RUGGERI, CIRCUIT JUDGE

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IN THE ELEVENTH CIRCUIT COURT IN AND FOR

PRICE, CARBON COUNTY, STATE OF UTAH

GMW CONSTRUCTION, A Partnership,	:	FINDINGS OF FACT AND CONCLUSIONS OF LAW
Plaintiff,	:	
vs	:	
ROBERT WAYNE COX and RONI COX,	:	
Defendants.	:	Civil No. 85-CV-104

This matter came on for trial on the 28th day of January 1987 and Plaintiff was personally present in Court and represented by Counsel, Nick Sampinos, and Defendants were personally present in Court and represented by Counsel, Marlynn Bennett Lema, and the Court having heard testimony and having received evidence and being fully advised in the premises and having entered its Memorandum Decision hereby finds as follows:

FINDINGS OF FACT

1. That this Court has jurisdiction.

HD

2. That the Court finds in favor of Defendant on their Counterclaim and against Plaintiff on their Complaint.

3. That the fireplace in question was operational and in use as the only source of heat at the time Plaintiffs undertook repairs.

4. That the work done by Plaintiffs resulted in structural modification of the fireplace as well as cosmetic changes.

5. That Plaintiffs installation and repair of the firebrick and the "heatalator" was the direct cause of the malfunction of the fireplace.

6. That Plaintiffs cutting and fitting the rock and masonry work allowed chips and rock particules to damage the Defendants television set and other furniture pieces.

7. That Plaintiffs removed and destroyed an existing oak mantle belonging to the Defendants.

8. That Plaintiffs faulty construction/alteration is the direct cause of the damages incurred by Defendants, as follows:

Damage to TV Tuner and Furniture	$ 596.00
Damage to Drapes and Walls	620.55
Cleaning and Painting	500.00
Repair and Cleaning of Carpet	583.28
Oak Mantle destroyed	325.00
Replacement costs for Fireplace	1,500.00

9. That the pre-trial order provided for attorneys fees, and the Court fixes Defendants attorneys fees at $725.00.

10. That Plaintiffs returned, for credit, 100 red brick at 3 cents each for a total of $30.00, which amount belongs to Defendants.

Based upon the foregoing Findings of Fact, the Court concludes as follows:

B. Lema
Y AT LAW
AIN STREET
'AH 84501
17-2690

CONCLUSIONS OF LAW

1. That Judgment should be awarded as against Plaintiff and in favor of Defendants in the amount of $4,154.83 plus $725.00 as and for attorney fees and costs of Court in the amount of $10.00 for a total of $4,989.83 same to bear interest at the rate of 8% per annum until paid.

DATED this 27 day of ~~February~~ March, 1987.

A JOHN RUGGERI
CIRCUIT COURT JUDGE

APPROVED AS TO FORM AND CONTENT.

NICK SAMPINOS
ATTORNEY FOR PLAINTIFF

Marlynn B. Lema
ATTORNEY AT LAW 1933
248 EAST MAIN STREET
PRICE, UTAH 84501
(801) 637-2690
ATTORNEY FOR:
DEFENDANTS
ROBERT WAYNE COX
RONI COX
222 North 2nd East
Price, Utah 84501

IN THE ELEVENTH CIRCUIT COURT IN AND FOR
PRICE, CARBON COUNTY, STATE OF UTAH

GMW CONSTRUCTION, A Partnership,	:	O R D E R
Plaintiff,	:	
vs	:	
ROBERT WAYNE COX and RONI COX,	:	
Defendant..	:	Civil No. 85-CV-104

This matter came on for trial on the 23th day of January, 1987 before the Honorable A. John Ruggeri, Circuit Court Judge, and the Plaintiff was personally present in Court and represented by Counsel, Nick Sampinos, and Defendants were personally present in Court and represented by Counsel, Marlynn Bennett Lema, and the Court having heard testimony and having received evidence and being fully advised in the premises and having entered its Memorandum Decision and having entered its Findings of Fact and Conclusions of Law, Now Therefore,

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IT IS HEREBY ORDERED as follows

1. That Judgment is hereby awarded as against Plaintiff and in favor of Defendants in the amount of $4,154.83 plus $725.00 as and for attorney fees and costs of Court in the amount of $10.00 for a total of $4,989.83 same to bear interest at the rate of 8% per annum until paid.

DATED this 17 day of ~~February~~ MARCH, 1987.

BY THE COURT

A. JOHN RUGGERI
CIRCUIT COURT JUDGE

APPROVED AS TO FORM AND CONTENT.

NICK SAMPINOS
ATTORNEY FOR PLAINTIFF

DOCKET
3 G 6-15
DATE 4-3-87

44

Marlynn Bennett Lema
ATTORNEY AT LAW
248 EAST MAIN STREET
PRICE, UTAH 84501
(801) 637-2690

January 29, 1987

To The Honorable
A. John Ruggeri
Circuit Court Judge
Carbon County Court Complex
149 East First South
Price, Utah 84501

Dear Judge Ruggeri:

Re: GMW v. Cox 85-CV-104

Enclosed are receipts for replacement for curtains, drapes, bedroom and bath accessories which were damaged by smoke.

You will note that the products were delivered to the Cox home but billed to Mr. Phil Gonzales who allowed Mrs. Cox to use his charge account to purchase the items which were ordered from Fingerhut.

Also enclosed is a note from Mr. Gonzales confirming Mrs. Cox use of his account.

Sincerely,

Marlynn B. Lema
Attorney at Law

MBL/ss

cc: Nick Sampinos
File

Enclosures (7)

1

GEN	.38
GEN	1.37
GEN	1.24
TAX	.14
TOTAL	3.13
CASH	5.00
CHANGE	1.87

06/09 21:21:44

Rad attachments
2 - Rads

Receipt for sheets

THANK YOU FOR
SHOPPING OUR K MART
RETAIN FOR REFUND
STORE #9325 07/15/86

HOM	1.67
HOM	.78
HOM	.68
HOM	1.27
HOM	1.67
GEN	1.27
TAX	.40N
TOTAL	7.74
CASH	10.00
CHANGE	2.26

GFN	6.83
GEH	6.89
GEH	14.22
TAX	1.54
TOTAL	29.52
CASH	100.00
CHANGE	70.48

THANK YOU FOR
SHOPPING OUR K MART
RETAIN FOR REFUND
STORE #0325 09/09/8

2 sheers on
either side
& front door

2 @ 6.88

1 @ 14.22

TABLE ROUND WINE
TABLE ROUND WINE
SPREAD QU/2SH WINE

IF YOU WISH TO USE OUR CONVENIENT MONTHLY PAYMENT PLAN, YOU WILL HAVE 12 MONTHS TO PAY THE TOTAL SALE PRICE. THE FIRST PAYMENT OF $19.73 WILL BE DUE ON 11-05-86 AND THE 11 REMAINING PAYMENTS WILL BE $19.73 EACH.

IF YOU WISH TO PAY CASH, THE TOTAL OF $208.65 WHICH INCLUDES FINGERHUT PRICE, $197.93, AND SHIPPING/HANDLING, $10.72, MUST BE REMITTED PRIOR TO 11-05-86 AND NO FINANCE CHARGE WILL BE DUE.

CUST NO 109-5393-037 25372000159 0

FINGERHUT CO ST CLOUD MINNESOTA 56395

Bedroom
208.65

PRISCILLA 100X81 EGG MEASURING TP POLYBAG
PRISCILLA 100X81 EG NECK/BRAC/EAR BOX
PANEL 60X63 EGGSHEL LIGHT W/BATTERIES
PANEL 60X63 EGGSHELL
PANEL 60X63 EGGSHELL
PANEL 60X63 EGGSHELL
PANEL 60X81 EGGSHELL
PANEL 60X81 EGGSHELL
PANEL 60X81 EGGSHELL
PANEL 60X81 EGGSHELL

IF YOU WISH TO USE OUR CONVENIENT MONTHLY PAYMENT PLAN, YOU WILL HAVE 9 MONTHS TO PAY THE TOTAL SALE PRICE. THE FIRST PAYMENT OF $18.45 WILL BE DUE ON 11-27-86 AND THE 8 REMAINING PAYMENTS WILL BE $18.45 EACH.

IF YOU WISH TO PAY CASH, THE TOTAL OF $150.60 WHICH INCLUDES FINGERHUT PRICE, $135.90, AND SHIPPING/HANDLING, $14.70, MUST BE REMITTED PRIOR TO 11-27-86 AND NO FINANCE CHARGE WILL BE DUE.

CUST NO 109-5393-037 27527979104 0

FINGERHUT CORPO JD, MINNESOTA 56395

Draperies
135.90

fingerhut

CUSTOMER NO. 109-5393-037 11-13-86
MR PHIL GONZALES 1-2106-1
222 NORTH 2 E
PRICE UT 84501 PAGE 3

DATE	TRANSACTION	CHARGE	CREDIT	BALANCE
	PLAQUES BUTTRFLY 3PC			
	BALANCE			99.60
10-26-86	PURCHASE 27976918	64.44		
	WARDROBE 7-RING			
	BALANCE			64.44
10-20-86	PURCHASE 27527979	166.05		
	PRISCILLA 100X81 EGG			
	BALANCE			166.05
10-20-86	PURCHASE 27527997	74.25		
	PRISCILLA 100X81 EGG			
	BALANCE			74.25
10-20-86	PURCHASE 27574485	53.40		
	CANISTER SET 8PC			
11-06-86	PAYMENT		47.06	
11-06-86	FINANCE CHGE. ALLOW.		6.34	
	BALANCE			.00
10-20-86	PURCHASE 27574486	40.14		
	WALL SHELF/CLOWN-FIG			
11-06-86	PAYMENT		36.41	
11-06-86	FINANCE CHGE. ALLOW.		3.73	
	BALANCE			.00
10-21-86	PURCHASE 27574543	66.72		
	SPACE SAVER 3CAB NAT			
	BALANCE			66.72
10-20-86	PURCHASE 29301198			
	TOWELS/RUGS BLUE			
	ORDER RECEIVED - NOT INVOICED			

ENCLOSURE CONTINUED ON PAGE 4

fingerhut

CUSTOMER NO. 109-5393-037 11-13-86
MR PHIL GONZALES 1-2106-1
222 NORTH 2 E
PRICE UT 84501 PAGE 4

DATE	TRANSACTION	CHARGE	CREDIT	BALANCE
11-10-86	PURCHASE 29367893	51.84		
	LINER & SH CURTAIN B			
	BALANCE			51.84
	TOTAL BALANCE			1115.05

ENCLOSURE

I Mrs. Della Gonzales verify that Roni Cox has used my Tigerlut acct. for over a year with my permission. She is the only one who uses it She has made several purchases on it.

Thank you
Mrs Phil Gonzales
1-29-1987

Call me if you need to
637-0699